

amounts of medical and disability compensation paid by Tru-Circle after October 17, 2004. The parties agreed that those amounts were to be used when certification for reimbursement from Tect is ordered. The Board heard oral argument on March 4, 2009.

ISSUE

Did the ALJ err in ruling that he does not have jurisdiction and authority to certify to the Insurance Commissioner for reimbursement of benefits and expenses from one carrier to another pursuant to K.S.A. 44-534a(b)? The ALJ declined to certify the requested amounts to the Insurance Commissioner, holding that the power to certify lies exclusively with the Director.

FINDINGS OF FACT

Claimant worked as a welder for Tru-Circle when, on March 18, 2004, he suffered a work-related injury. In July 2004, claimant's job was changed from a sit-down job to one which required more standing. This resulted in an aggravation to his hip and back. The ownership of respondent business changed on October 18, 2004, with Tect purchasing Tru-Circle. Claimant's job again changed and additional aggravation was caused to his hip and back. However, Tru-Circle continued to pay for claimant's workers compensation benefits, even after the sale of the company.

Claimant was awarded a 22 percent whole body permanent partial functional disability by the Board, which award was affirmed by the Court of Appeals in its Memorandum Opinion of June 6, 2008. The March 27, 2007, Order of the Board modified the liability of the respondents and their insurance companies. Tru-Circle was found liable for any treatment or disability through October 17, 2004. Thereafter, Tect and its insurance company, Zurich American, were found to be responsible for claimant's medical treatment and any disability which was awarded to claimant. Any disputes between the respondents and their insurance companies over the amount of each company's responsibilities were to be presented to the ALJ for a determination as to the amount of reimbursement due.

The Board, in its Order of March 27, 2007, stated:

Should a dispute arise between the respective respondents and their insurance companies, the matter should be presented to the ALJ for determination of the amount of reimbursement due.¹

¹ Board's March 27, 2007, Order at 3.

The matter came before the ALJ on November 18, 2008, at which time respondent Tru-Circle and its insurance company Great Northern requested reimbursement from Tect and its insurance company Zurich American for the amounts paid by Tru-Circle for benefits to claimant on and after October 18, 2004. Respondent's Exhibit 1 of the Motion Hearing listed both the temporary total disability (TTD) and the medical benefits paid by Tru-Circle on and after October 18, 2004. There was no objection to that exhibit. The ALJ cited K.S.A. 44-512(a) [*sic*], K.S.A. 44-534a(b) and K.S.A. 44-556(e) as justification for ruling that the ALJ did not have the jurisdiction to order reimbursement from one insurance company to another. The ALJ ruled that only the Director had that authority. Therefore, the ALJ refused to order the reimbursement. The matter was then appealed to the Board.

At oral argument to the Board, the parties stipulated that the amounts of TTD and medical benefits listed in Respondent's Exhibit 1 of the Motion Hearing were the amounts paid by Tru-Circle on and after October 18, 2004, and there was no issue remaining regarding those figures. In its Order of March 27, 2007, the Board determined that reimbursement to Tru-Circle from Tect was appropriate, stating at page 6 of the Order:

Any disability benefits paid by Tru-Circle for the time period after October 17, 2004, or any medical benefits provided after October 17, 2004, and paid for by Tru-Circle are the responsibility of Tect.²

This ruling was affirmed by the Court of Appeals in its Memorandum Opinion of June 6, 2008, and no additional appeal was taken from that ruling.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-512a states:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of

² Board's March 27, 2007, Order at 6.

such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

(c) The remedies of execution, attachment, garnishment or any other remedy or procedure for the collection of a debt now provided by the laws of this state shall apply to such action and also to all judgments entered under the provisions of K.S.A. 44-529 and amendments thereto, except that no exemption granted by any law shall apply except the homestead exemption granted and guaranteed by the constitution of this state.³

It was argued to the ALJ that Tru-Circle was entitled to penalties due to Tect's failure to pay the amounts claimed due. However, that issue was not raised to the Board on appeal.

K.S.A. 44-534a(b) states:

If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance

³ K.S.A. 44-512a.

therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.⁴

Tect argued that Tru-Circle is obligated to seek reimbursement from the Workers Compensation Fund (Fund) for any amounts wrongfully paid claimant. However, the language of the statute is clear. There has been no finding that claimant was overpaid any amounts in this matter. The only dispute centered around which entity is obligated to pay those benefits.

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.⁵

K.S.A. 2003 Supp. 44-556(e) states:

If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer, the employer's insurance carrier or the workers compensation fund during the pendency of review under this section, and pursuant to K.S.A. 44-534a or K.S.A. 44-551, and amendments thereto, and the employer, the employer's insurance carrier or the workers compensation fund, which was held liable for and ordered to pay all or part of the amount of compensation awarded by the administrative law judge or board, is held not liable by the final decision on review by either the board or an appellate court for the compensation paid or is held liable on such appeal or review to pay an amount of compensation which is less than the amount paid pursuant to the award, then the employer, employer's insurance carrier or workers compensation fund shall be reimbursed by the party or parties which were held liable on such review to pay the amount of compensation to the worker that was erroneously ordered paid. **The director shall determine the amount of compensation which is to be reimbursed to each party under this subsection, if any, in accordance with the final decision on the appeal or review and shall certify each such amount to be reimbursed to the party required to pay the amount or amounts of such reimbursement.** Upon receipt of such certification, the party required to make the reimbursement shall pay the amount or amounts required to be paid in accordance with such certification. No worker shall be

⁴ K.S.A. 44-534a(b).

⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 6, 154 P.3d 494, *reh'g denied* (2007).

required to make reimbursement under this subsection or subsection (d).
(Emphasis added).⁶

When dealing with disputes between insurance companies, and their liabilities, K.S.A. 2003 Supp. 44-556(e) answers the questions of how to proceed and who has jurisdiction over decisions involving reimbursement. The Kansas Court of Appeals has dealt with the possible conflict between reimbursements from the Fund under K.S.A. 44-534a and reimbursements between insurance companies under K.S.A. 2003 Supp. 44-556(e). In *Kimber*,⁷ the claimant alleged injuries to both hands and knees as the result of a fall while working for U.S.D. No. 418. A workers compensation claim was filed and assigned Docket No. 169,842. The claimant then left the school district, and on December 19, 1991, she began working for Cedars, Inc. (Cedars). On December 1, 1992, Kimber filed a workers compensation claim against Cedars for injuries to both wrists. The two cases were consolidated by agreement of the parties for procedural purposes and the Fund was impleaded. The ALJ denied Kimber an award against the school district, but awarded her a 20 percent permanent partial general work disability against Cedars. Cedars was ordered to reimburse the school district and its insurance company for all amounts previously expended in Docket No. 169,842. On appeal to the Board, the award was affirmed, except to modify the order to require Cedars to only reimburse the school district for compensation and medical expenses incurred subsequent to Kimber becoming employed by Cedars on December 19, 1991. Both the ALJ and the Board found Kimber's date of accident with Cedars to be May 15, 1992. The only issue on appeal was whether the Board had erred in ordering Cedars and its insurance company to reimburse the school district for all funds expended for the period subsequent to December 19, 1991, the date Kimber commenced her employment with Cedars. The Court, in analyzing K.S.A. 44-534a and K.S.A. 44-556(d), determined that the Board had erred in ordering reimbursement from Cedars for the period of employment before the actual date of injury with Cedars. Any reimbursement before that date was found to be the obligation of the Fund. However, Cedars and its insurance company were found liable for all compensation and medical expenses expended by the school district from May 15, 1992, claimant's date of accident with Cedars, and forward.

In *Lott-Edwards*,⁸ the claimant filed separate claims against one employer for a series of accidents culminating on the last day the claimant worked for that respondent. However, *Lott-Edwards* did involve separate insurance companies, each with coverage over a separate period of the claimant's series of injuries. The Board found, and the

⁶ K.S.A. 2003 Supp. 44-556(e).

⁷ *Kimber v. U.S.D. No. 418*, 24 Kan. App. 2d 280, 944 P.2d 169, rev. denied 263 Kan. 886 (1997).

⁸ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

Court of Appeals affirmed, that each insurance company should remain responsible for the benefits incurred during its respective periods of coverage. To find otherwise would jeopardize the prompt payment of temporary total disability and medical benefits in repetitive trauma cases until the claimant left work or permanent restrictions were implemented as a result of the injuries.⁹

Here, claimant suffered a series of accidents while working for separate employers, each with its own insurance company. As was found in *Lott-Edwards*, each is responsible for the benefits incurred during its respective periods of employment and insurance coverage. This was the Board's finding in its Order of March 27, 2007. That Order was appealed to the Court of Appeals and was affirmed. Thus, the finding of two accidents, with Tru-Circle and Tect being responsible for the benefits from their own respective periods of coverage, became the law of the case upon the conclusion of the appellate process. The Board ordered that the matter was to be presented back before the ALJ should a dispute arise as to the amount of reimbursement due. The stipulation of the parties as to the appropriate amounts of reimbursement due has rendered that portion of the Board's Order moot. The next step under K.S.A. 2003 Supp. 44-556(e) is the certification of those amounts by the Director. The ALJ found that he lacked jurisdiction to determine the amounts due. With the amounts paid for medical treatment and TTD stipulated by the parties, the ALJ was correct that he did not have the authority to certify those amounts. That duty is statutorily designated to the Director.

A Motion For Order Of Reimbursement was filed with the Director on November 26, 2008, requesting that very action. The Director, in her letter of December 9, 2008, advised that the matter was still pending before the Board. When all appeals had passed, the parties were instructed to advise the Director's office and again request certification. As such, the next step herein is to petition the Director for that certification.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Order of the ALJ should be affirmed, as the ALJ does not have the jurisdiction to certify amounts due and owing under K.S.A. 2003 Supp. 44-556(e). That duty is solely the responsibility of the Director and there is no indication that the Director has delegated that duty.

⁹ *Id.* at 698.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated November 19, 2008, should be, and is hereby, affirmed, and the parties are instructed to once again petition the Director for certification of the amounts due and owing under K.S.A. 2003 Supp. 44-556(e).

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent Tru-Circle and its Insurance Carrier Great Northern
Douglas C. Hobbs, Attorney for Respondent Tect and its Insurance Carrier Zurich American
John D. Clark, Administrative Law Judge